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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1961

No. 852

B. T. WOODARD and B. J. WOODARD
d/b/a WOODARD MOTOR COMPANY,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Respondent's Supplemental Brief

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Continuing to distort the opinion and record below, petitioners base their reply brief upon the same false premise as the petition itself. The false premise is the baseless assertion that the reasoning of the court below, in disposing of petitioners' Count I claim for common law breach of contract, was "the indispensable predicate" of the court's separate disposition of petitioners' Count II claim for violation of the Act (Reply Br. 2-3).

Contrary to petitioners' assertion, the court in its consideration and disposition of Count II *did not* hold

> "that as a matter of law, the petitioners, upon respondent's professed dissatisfaction, sincere or not, became obligated to move the dealership."

What the court actually held, in disposing of petitioners' Count II claim, was that where (1) respondent notified petitioners "prior to the execution and delivery of the agreement that the [respondent] regarded the Stonewall Street premises as unsuitable and inadequate" and (2) "Before, at the time of, and subsequent to the execution and delivery of the contract the [petitioners] promised to procure a satisfactory and adequate location for the Chevrolet dealership" and (3) after a lapse of sixteen months, petitioners still continued to occupy the premises which had been rejected prior to the execution of the contract, the "duty of good faith, however measured, did not require the [respondent] to continue the contract arrangement for a longer period" (Pet. 17a-18a).

The question of whether the petitioners were contractually obligated (a) to supply facilities satisfactory in the judgment of respondent itself, exercised honestly and in good faith, or (b) to supply facilities satisfactory only in the judgment of a hypothetical reasonable man, was in no wise involved because, as recognized by the court below, the Stonewall Street premises had been excluded as a dealership location by express agreement of the parties "Before, at the

time of, and subsequent to the execution and delivery of the contract" and *petitioners never furnished any other facilities to be judged either by respondent or by a hypothetical reasonable man.*

Petitioners' further assertion (Reply Br. 3) that the record contains evidence that the Stonewall Street premises "were satisfactory in appearance and location both in fact and in the judgment of respondent" is not only irrelevant but is wholly unsupported by the "evidence" cited. (1) Buick's approval of the premises for the operation of an exclusive Buick dealership is no evidence that the same premises were satisfactory and adequate to house, in addition, a Chevrolet dealership whose sales, prior to the unauthorized move, had been five times the volume of the Buick dealership sales (Br. in Opp. 11). (2) Wholly inexcusable is petitioners' representation to this Court that the son testified that "he could handle 1000 cars per year with a building of the same square footage as the Stonewall Street premises" (Reply Br. 4, 10), without disclosing that the son made it clear that he was not referring to "an old type building" like the Stonewall Street premises or to "the type building you would use in cold weather" but to "what we call a western type building" which would be only "for your service department" and contain separate stalls with "individual doors" for each car brought in for service (R. 305-6). (3) Finally, Chevrolet's willingness to submit to petitioners' dual occupancy of the Stonewall Street premises as "only a temporary thing" for "a short period of time" and to be remedied "as soon as possible" cannot be tortured into "evidence" that the

premises were satisfactory and adequate. Much less can it be tortured into support for petitioners' claim, advanced for the first time in their reply brief, that the parties intended that petitioners' occupancy of the Stonewall Street premies was to continue for "a time then clearly foreseen to be years in the future."*

This progression from assurances to respondent in 1956 that the Stonewall Street location was "purely temporary" and that they planned to move "just as quick as we could get available a new building or a different building" to representations to this Court in 1962 that petitioners were under no obligation to perform until "a time then clearly foreseen to be years in the future" plainly demonstrates that the courts below properly held, on the undisputed facts, that petitioners claims were without merit as a matter of law.

*It should be pointed out that the final statement of the District Court in the colloquy concerning the new highway, quoted on page 7 of petioners' Reply Brief, was not part of the stipulation of the parties but, as stated by the court in its order, "is only a continuation of a statement of one of plaintiffs' contentions" (R. 144).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May 14, 1962

CERTIFICATE OF SERVICE

I, Ira Butler, attorney for respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of May, 1962, I served the foregoing RESPONDENT'S SUPPLEMENTAL BRIEF by depositing two envelopes containing three copies each in a United States mail box, with first-class postage prepaid, addressed respectively to Irving L. Goldberg, Esq., and to William P. Fonville, Esq., both at 2232 Republic National Bank Building, Dallas 1, Texas, attorneys for petitioners.

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